

In the Matter of the Compensation of
MICHAEL D. MILLSPAUGH, Claimant
Own Motion No. 22-00017OM
OWN MOTION ORDER
Edward J Hill, Claimant Attorneys
SAIF Legal, Defense Attorneys

Reviewing Panel: Members Curey and Ousey.

The SAIF Corporation has submitted an Own Motion Recommendation against the reopening of an Own Motion claim for a “worsening” of claimant’s previously accepted inguinal hernia conditions. *See* ORS 656.278(1)(a). Among other contentions, SAIF argues that claimant was not in the work force at the time of his current disability. Claimant asserts that it should be presumed that he was in the work force and that he is entitled to penalties/attorney fees under ORS 656.262(11)(a) for SAIF unreasonable claim processing.¹ Based on the following reasoning, we are not authorized to reopen the claim and penalties/attorney fees are not warranted.

Pursuant to ORS 656.278(1)(a), one of the requirements for the reopening of an Own Motion claim for a worsening of a compensable injury is that the worker must be in the “work force” at the time of disability. *See Dawkins v. Pacific Motor Trucking*, 308 Or 254 (1989). If a claim does not satisfy this requirement, the Own Motion claim does not qualify for reopening. *See Patrick T. Daggett*, 62 Van Natta 2465 (2010).²

Here, the record does not establish claimant’s presence in the work force during the relevant period.³ Specifically, at the time of his current disability (*i.e.*,

¹ A supplemental briefing schedule was implemented on January 27. The time to submit supplemental briefs has now expired. Consequently, we have proceeded with our review.

² Pursuant to the court’s reasoning in *Dawkins*, a claimant is in the work force at the time of disability if he or she is: (1) engaged in regular gainful employment; or (2) not employed, but willing to work and is seeking work; or (3) not employed, but willing to work and is not seeking work because a work-related injury has made such efforts futile. *Dawkins*, 308 Or at 258.

³ According to the record, claimant chose to end an Authorized Training Program in May 2013. (Ex. 44). In June 2013, an examining physician reported that “[claimant] is not working at all.” (Ex. 46). On September 11, 2013, a Notice of Closure awarded a total of 25 percent whole person permanent impairment and 43 percent work disability for claimant’s inguinal hernia conditions. (Ex. 49-5). Claimant’s “Residual Functional Capacity” was rated as “S/L” (sedentary/light). (*Id.*) Thereafter, there is no indication that claimant returned to the work force.

when he underwent surgeries for his accepted inguinal hernias), he neither had returned to his employment, sought employment, nor had a physician considered it futile for him to do so.⁴

Under such circumstances, we are not persuaded that claimant was in the work force before he became disabled from his accepted hernias.⁵ Consequently, we are not authorized to reopen claimant's Own Motion claim. ORS 656.278(1)(a); *Stuart T. Valley*, 55 Van Natta 475, 478-79 (2003).

We turn to claimant's "penalty/attorney fee" request.⁶ Within 30 days of a carrier's determination that a claim is compensable, a carrier is required to either voluntarily reopen an Own Motion claim or submit an Own Motion Recommendation. See OAR 438-012-0001(3)(a); OAR 438-012-0030(1)(a), (b).

Here, SAIF filed its Own Motion Recommendation on January 27, 2023, which is more than 30 days after it chose not to contest its responsibility for claimant's June 2019 and November 2019 surgeries. (Ex. 68, 74); see OAR 438-012-0001(3)(a); OAR 438-012-0030(1)(a), (b). Thus, SAIF untimely processed claimant's Own Motion claim. Nevertheless, because we have determined that claimant's Own Motion claim will not be reopened, neither penalties nor attorney fees under ORS 656.262(11)(a) are awardable.⁷ See *Noel Brown*, 62 Van Natta 2303 (2010); *Donald L. Duquette*, 60 Van Natta 797 (2008).

⁴ The record reflects a date for birth for claimant in March 1954. (Exs. 68, 74). Therefore, claimant's age at the time of his June and November 2019 hernia surgeries was 65.

⁵ Claimant asserts that a presumption exists that he was in the work force before the disability date for his accepted hernias. Yet, a claimant has the burden of proving the nature and disability resulting from a compensable injury/occupational disease. See ORS 656.266(1). As explained above, the record does not support the "work force" requirement necessary for the reopening of claimant's Own Motion claim.

⁶ Asserting that the attending physician restricted him from working, claimant contends that SAIF unreasonably failed to pay temporary disability benefits. However, a carrier's obligation to pay temporary disability benefits concerning an Own Motion claim is not triggered unless and until the claim has been reopened (either voluntarily or by means of Board order). See OAR 438-012-0035(4)(a), (b); *Edward A. Billman*, 55 Van Natta 693, 694 (2003). Here, because the Own Motion claim has not been reopened (either voluntarily or by means of a Board order), SAIF was not obligated to pay temporary disability benefits.

⁷Notwithstanding this determination, SAIF is reminded of its responsibility to process Own Motion claims in a timely manner.

Accordingly, based on the aforementioned reasoning, the requests for claim reopening and penalties/attorney fees are denied. Claimant's entitlement to medical expenses pursuant to ORS 656.245 is not affected by this order.

IT IS SO ORDERED.

Entered at Salem, Oregon on March 20, 2023